87-1499

Supreme Court, U.S.
FILED
MAR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In The

Supreme Court of the United States

1988 Term

W. STERLING ANDERSON AND
RONALD CLEMENT BISHOP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the form of the government's conscious avoidance instruction constituted reversible error because it distorted the guilty knowledge requirement, diluted the reasonable doubt standard and shifted the burden of proof to the defendants?

2. Whether the Court of Appeals erred when it applied the plain error doctrine without first addressing the merits of the issue presented for appeal.

3. Whether the Court of Appeals erred when it applied the plain error standard where defense counsel specifically objected to the conscious avoidance instruction both at the charging conference and following the giving of the charge to the jury.

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William Sterling Anderson and Ronald Clement Bishop respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reprinted in the Appendix to this Petition. (App. A-1 - A-4)

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1987. (App. A-5). A petition for rehearing and suggestion for rehearing en banc was denied on January 6, 1988. (App. A-6 - A-7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioners, William Sterling Anderson and Ronald Clement Bishop, were named as defendants in a 25 count indictment returned by the federal grand jury for the District of South Carolina. Following a jury trial, Anderson was convicted of one count of conspiracy for violation of 18 U.S.C. § 371; 10 of 15 counts of wire fraud for violation of 18 U.S.C. § 1343; and one

of six counts of false statement for violation of 18 U.S.C. § 1014. Petitioner Bishop was named as co-defendant with Anderson on the conspiracy count and the six false statement counts and was convicted of all counts.

Anderson was sentenced to five years on the single count of conspiracy and on each of four counts of wire fraud, sentences to run concurrently. He was sentenced to two years on each of the remaining six wire fraud counts and the false statement count, with those sentences running concurrently with each other but consecutive to the five year sentences. Bishop received concurrent two year sentences on each of the counts on which he was convicted.

The only contested factual issue below was guilty knowledge. The evidence at trial showed that Anderson was President and owner of A & M Mobile Homes, a business operating out of Spartanburg, South Carolina. Bishop,

Anderson's brother-in-law, was an A & M employee. The charges in this case focused on allegedly deceptive practices used by various A & M employees to obtain financing for the sale of mobile home units. At issue were fifteen sales transactions for which financing was obtained from two lending institutions relying on allegedly false credit information supplied by A & M employees.[1] A & M employees testified that between 1982 and 1985, A & M utilized dubious sales practices including falsifying purchasers' W-2 forms and check stubs to alter income, creating fictitious credit histories falsifying information about dependents, creating fictitious employment references, and altering A & M bank deposit slips reflecting the amount of the down

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[1] Each transaction formed the basis of a wire fraud charge. Six of the fifteen transactions resulted in false statement charges based on falsifying information on credit applications. The entire course of conduct formed the basis of the conspiracy charge.

payment customers paid A & M.

Evidence against Anderson and Bishop included employee testimony that Anderson and Bishop knew about these practices, approved them, and participated in them. One witness testified against Anderson specifically that Anderson had discussed these practices with the witness, that the witness had heard Anderson discuss these sales practices with others, and that the sales practices were discussed at several sales meetings. The witness also authenticated the minutes of two sales meetings which tended to show Anderson's knowledge and approval of deceptive financing practices. The witness testified that he had seen Bishop prepare two falsified W-2 forms. This testimony was corroborated by other witnesses occupying sales or managerial positions at A & M and who admitted criminal involvement in the transactions. Witnesses from the lending

institutions also gave testimony regarding the information A & M supplied to them. A & M customers testified that the information on the loan applications was false. Finally, a documents expert testified that the handwriting on six bank deposit slips was Bishop's.

Petitioners acknowledge now as they did below that fifteen loan applications contained materially false information. The central issue at trial was whether Anderson and Bishop knew that the information supplied to the lending institutions was false. Anderson and Bishop denied knowing that these particular loan applications were false. They further denied having knowledge that deceptive financing practices were common at A & M and denied condoning or encouraging these deceptive practices.

In his defense, Anderson showed that circumstances required him to delegate considerable responsibility to two

employees, assigning them management of the day-to-day operations from January, 1982 until August, 1985. While he was president of A & M , the business had expanded from a lot with 10-20 mobile homes to a business with more than 100 units. This expansion multiplied his duties and consumed his time so as to necessitate delegation of considerable responsibility. Additionally, Anderson was away from the business for large portions of time during his tenure as representative to the South Carolina General Assembly and during his 1982 campaign for speaker pro tempore. His time was further occupied defending criminal charges brought against him in a South Carolina Tax Commissioner investigation. Although Anderson was acquitted on all charges, an A & M employee to whom Anderson had delegated managerial responsibility was convicted on 46 of 100 criminal counts in the matter. It was those employees who

served as the principle witnesses against Anderson in the trial here at issue. It was during this time period that the 15 transactions occurred.

Bishop's defense was that he worked in neither a managerial nor sales capacity. He only handled bookkeeping duties, working with information generated by the sales staff. His duties did not include verification of information. Thus, his submission of bank deposit slips was undertaken without knowledge of the true facts.

At the charging conference, the government proposed an instruction on conscious avoidance based on out-of-date cases, the most recent being 1973. Defense counsel objected to the instruction on grounds that it negated the intent requirement of the offense and that it was based on inadequate research. The defense renewed their objection to the instruction

following the actual charge to the jury. Anderson and Bishop then appealed their convictions contending that the jury instruction on conscious avoidance tendered by the government effectively diluted the reasonable doubt standard, essentially shifted the burden of proof from the government to the defendants, and was inapplicable to the conspiracy counts. Anderson and Bishop filed Notices of Appeal in the United States Court of Appeals for the Fourth Circuit and their cases were consolidated by court order for purposes of briefing and oral argument.

A hearing for bail pending appeal took place on March 10, 1987, at which Anderson and Bishop cited the defective conscious avoidance instruction as the basis of the appeal. The government did not raise the plain error argument even though Judge Simons of the District Court permitted lengthy discussion of the basis of

petitioners' appeal. He ruled on the merits, denying defendants' motion. Petitioners presented their motion for bail to Judge Ervin of the Fourth Circuit who responded via a conference call during which he cautioned the government to discontinue use of the obsolete instruction on conscious avoidance. Again, the government did not raise the plain error argument. Chief Judge Winter, Judges Murnaghan, and Sprous heard oral argument on July 27, 1987, where the government conceded 1) that the charge was deficient as given and 2) that it was derived from an early 1970's charge book from the Eastern District of New York. The Fourth Circuit declined to address the issue of the conscious avoidance instruction. It found that the defense's objection was inadequate to preserve the right to appeal the issue and applied the plain error doctrine, to affirm Petitioners' convictions in a brief unpublished opinion. (App. A-1 -

A-4). Petitioners' request for rehearing and suggestion for rehearing en banc was denied. (App. A-6 - A-7).

Petitioners now seek review of 1) the Fourth Circuit's affirmance of Petitioners' convictions in light of the conscious avoidance instruction, and 2) application of the plain error doctrine in the absence of an analysis of the merits of the issue presented on appeal and where defense counsel objected both before and after the giving of the instruction.

REASONS FOR GRANTING THE PETITION

The decision below raises three issues of considerable and recurring significance. First, there is troubling disparity among the circuits with regard to the minimum requirements of the conscious avoidance instruction--an instruction which distinguishes guilty knowledge from the less culpable mental state of reckless conduct. Consequently, the burden of proof to which

the government is held when prosecuting violations of federal statutes varies depending upon the location of the trial. This case presents a proper setting to resolve that disparity and resulting confusion.

Second, the Court of Appeals for the Fourth Circuit used the plain error doctrine to avoid reaching the issue presented on appeal. The Court issued its decision in an unpublished opinion without analysis of either the question presented on appeal or its application of the plain error doctrine. Because the Fourth Circuit's application of the doctrine departs significantly from its application in other circuits and effectively precludes the development of the law through the appellate process, review by this Court is warranted.

Finally, the application of the plain error standard where an objection was made in a proper and timely manner at trial and

where neither the trial judge nor the government ever indicated any misunderstanding of the basis of petitioners' objection, is an extreme application. The use of the plain error standard in this situation, without explanation, can only create confusion and uncertainty for trial judges, defendants and prosecutors because the court has provided no guidelines for the steps which are required for preservation of issues for appeal. Because there is disparity among the circuits as to the requirements of Rules 30, 51 and 52 of the Federal Rules of Criminal Procedure, this case presents a proper vehicle for defining the requirements for preservation of appeal to facilitate a uniform application of the plain error standard.

I. REVIEW IN THIS CASE IS APPROPRIATE BECAUSE: A) THE COURTS OF APPEALS APPLY SIGNIFICANTLY DIFFERENT FORMS OF THE CONSCIOUS AVOIDANCE INSTRUCTION, B) THE INSTRUCTION GIVEN IN THIS CASE WOULD BE

UNACCEPTABLE IN MOST COURTS OF APPEALS, AND C) THE INSTRUCTION GIVEN BY THE TRIAL JUDGE WAS SO DEFECTIVE THAT IT BOTH MISREPRESENTED THE SUBSTANTIVE STANDARD OF GUILTY KNOWLEDGE AND IMPERMISSIBLY SHIFTED THE GOVERNMENT'S BURDEN OF PROOF TO THE DEFENDANTS, RESULTING IN EGREGIOUS PREJUDICE TO PETITIONERS.

The statutes under which petitioners were charged prohibit knowing misrepresentations in interstate transactions. Petitioners' defense was that they did not know the information given the lending institutions was false. Because the offenses require the mens rea of specific intent, it is crucial that the prosecution establish the element of knowledge. State of mind is typically proven by circumstantial evidence. Such circumstantial evidence can be established by showing that a defendant practiced "a studied ignorance to which they are not entitled." Turner v. U.S., 396 U.S. 398, 417 (1970). This "studied ignorance" is the underlying premise of the conscious

avoidance instruction. The government's burden of proof with regard to that premise is the subject of this appeal.

A. The Federal Courts Of Appeals Differ As To The Elements Required For Inclusion In A Proper Conscious Avoidance Instruction And Approve Significantly Varied Forms Of The Instruction.

The use of the conscious avoidance instruction in the federal courts appears to have originated with section 2.02(7) of the Model Penal Code. Approved in 1962, section 2.02(7) provides:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence unless he actually believes that it does not exist.

Its underlying premise is that guilty knowledge is a fact which usually must be proved through circumstantial evidence. It serves to distinguish guilty knowledge from negligent or reckless conduct which are less culpable states of mind. Section 2.02(7)

contemplates a special set of factual circumstances in which the inference of guilty knowledge is permissible.

While this Court has cited with approval the concept presented by the Model Penal Code approach to the jury instruction on conscious avoidance, Turner v. United States, supra, Leary v. United States, 395 U.S. 6, 46 n. 93, (1969), it has never directly determined the fundamental requirements of such a charge. Consequently, district courts have given widely varied conscious avoidance instructions.

There is disparity among the federal courts of appeals (and even within the individual circuits) regarding the minimum requirements of the instruction. One group of decisions establishes rigorous requirements. Within this group, the Second Circuit appears to apply the most stringent standard, requiring that a conscious

avoidance instruction "include references to a purposeful avoidance of the truth . . ., an awareness of high probability . . ., and the absence of defendant's actual belief in the nonexistence of the crucial fact". United States v. Aulet, 618 F.2d 182, 191 (1980); also see, United States v. Lanza, 790 F.2d 1015 (2nd Cir. 1986), United States v. Squires, 440 F.2d 859 (2nd Cir. 1971), United States v. Morales, 577 F.2d 769 (2nd Cir. 1978).

The Ninth Circuit requires that a proper deliberate ignorance instruction direct the jury to convict only on a finding beyond reasonable doubt that the defendant was aware of the high probability of the existence of the fact in question. United States v. Jewell, 532 F.2d 697, 704 (9th Cir. 1976), cert. denied, 426 U.S. 951, 96 S.Ct. 3173 (1976), United States v. Eaglin, 571 F.2d 1069, (9th Cir. 1977), cert. denied, 435 U.S. 1005, 104 S.Ct. 995 (1984).

The Jewell decision was clarified in United States v. Valle-Valdez, 554 F.2d 911 (1977). Read together, Jewell and Valle-Valdez would require a precisely worded version of the conscious avoidance instruction.

A second group of decisions recognizes the desirability of strong language, but has not required specific elements. Within this group, the Tenth Circuit has approved the language of Jewell, supra, but does not seem to require it. United States v. Glick, 710 F.2d 639 (10th Cir. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995 (1984).

Other jurisdictions appear to give the trial judge great latitude in the drafting of these instructions. While the First Circuit acknowledges the propriety of this type of instruction, United States v. Krowen, 809 F.2d 144 (1st Cir. 1987), United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982), cert. denied, 459 U.S. 991 (1982), 103 S.Ct. 347 (1982) it has not articulated

either specific language or more general elements to be included in a conscious avoidance charge. So, too, the Sixth Circuit has permitted use of the conscious avoidance principle, but has not articulated specific elements or language. That court has approved an instruction allowing the jury to infer that the defendants "acted with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth about the unlawful transaction . . ." United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir.), cert. denied, 464 U.S. 1021, 105 S.Ct. 440 (1985), also see United States v. Holloway, 731 F.2d 378, (6th Cir. 1984), cert. denied, 469 U.S. 1021, 105 S.Ct. 440 (1985).

The Fifth Circuit requires neither the high probability language nor language regarding the defendant's actual belief in the nonexistence of the crucial fact. United States v. Deveau, 734 F.2d 1023 (5th

Cir. 1984), United States v. Cook, 586 F.2d 572, (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), 99 S.Ct. 2821 (1979). The court has approved an instruction which applied a reasonable doubt standard to a finding of reckless disregard for the truth plus a conscious purpose to avoid learning the truth. Cook, Id. at 579. The court also approved an instruction requiring a finding beyond a reasonable doubt of a conscious purpose to avoid "enlightenment." Deveau, supra at 1028, n.2.

Similarly, the Eighth Circuit has approved an instruction containing only the reasonable doubt language that the defendant had a conscious purpose to avoid "enlightenment." United States v. Graham, 739 F.2d 351, 352 (8th Cir. 1984). The Eleventh Circuit found an instruction to be appropriate even though it omitted the high probability language. United States v. Knight, 705 F.2d 432 (11th Cir. 1983).

The Seventh Circuit has declined to articulate language for an "ostrich" instruction, but has expressed concern that such an instruction should fully explain the principle of intentional avoidance. United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986), United States v. Kehm, 799 F.2d 354 (7th Cir. 1986). While the Court has approved the language of the Model Penal Code instruction, the Seventh Circuit leaves the drafting of specific language to the "good judgment of the district judges." Ramsey, supra, at 191. Consequently, that court has permitted the use of vastly differing language in these instructions.[2]

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[2] Compare United States v. Norwood, 798 F.2d 1094 (7th Cir. 1986) with United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986) and United States v. Kehm, 799 F.2d 354 (7th Cir. 1986). In Norwood the court of appeals approved an instruction which included both "high probability" language and actual belief language. Norwood, supra, at 1099. In Ramsey and in Kehm, the same circuit approved an instruction which contained neither of those elements in spite of the fact that the court judged the instruction to be somewhat "opaque" and "unhelpful."

Neither the Third nor the Fourth Circuits have directly addressed the question. The only explicit reference to the conscious avoidance instruction which could be found among Fourth Circuit decisions was United States v. Kelly, 718 F.2d 661 (4th Cir. 1983). The Kelly opinion stated that a criminal defendant could not escape criminal liability by willfully blinding himself to facts which otherwise would have been obvious to him. The court had no occasion to discuss which form of the conscious avoidance instruction it preferred nor did it have any need to discuss which departures from a preferred version would be tolerated.

Thus, the vast discrepancies among and within the courts of appeals with regard to the specific language of the conscious avoidance instructions suggest confusion within the circuits. This case is an

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Ramsey, supra, at 190.

appropriate vehicle to resolve that confusion and establish fundamental requirements on which courts, defense and prosecuting attorneys may rely.

B. The Conscious Avoidance Instruction Given By The Trial Court Is Seriously Defective Because It Shifted The Burden Of Proof To The Defendant, Failed To Adequately Distinguish Between The Concepts Of Reckless Disregard And Guilty Knowledge, And Failed To Require Proof Of the Underlying Fact Beyond A Reasonable Doubt.

At the Government's request, the District Court for the District of South Carolina gave the following conscious avoidance instruction to guide the jury in determining whether Anderson and Bishop had the requisite "guilty knowledge" for conviction:

> Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the government or prosecution prove to a certainty that the defendant

> knew that fraudulent statements concerning loan applications were being submitted to various financial institutions. The element of knowledge may be satisfied by proof that the defendant acted with deliberate disregard of whether fraudulent loan applications were being prepared and submitted, and with conscious purpose to avoid learning the truth, unless he actually believed that the statements in the application were true.

Guilty knowledge was the major theme of the government's closing remarks to the jury. Trial counsel for Anderson and Bishop strenuously objected to this instruction both at the charging conference and after the instruction was given. While petitioners acknowledge the purpose and propriety of a conscious avoidance instruction to assist the jury in determining guilty knowledge, they contend a) that the wording of this particular instruction was both legally erroneous and highly prejudicial, and b) that the use of any conscious avoidance instruction should

have been specifically limited to the counts of wire fraud and false statement.

1. A conscious avoidance charge must instruct the jury that the government is required to prove beyond a reasonable doubt that a defendant acted with a conscious purpose to avoid learning the truth of the underlying guilty act.

The version of the conscious avoidance instruction given by the trial court at the government's request is demonstrably obsolete. It was based on three Second Circuit decisions from the early 1970's: United States v. Jacobs, 475 F.2d 270 (2d Cir 1973); United States v. Sarantos, 455 F.2d 877 (2d Cir 1972); United States v. Squires, 440 F.2d 859 (2d Cir. 1971). (See Appendix A-8, Government's Jury Instruction No. 1). The government's reliance on these cases was misplaced for two reasons. First, after giving extensive consideration to the conscious avoidance instruction, the Second Circuit has since refined the content of the

instruction to be used by the trial courts in that circuit, <u>Aulet</u>, <u>supra</u>, effectively rendering the language relied on by the government unacceptable. The Second Circuit now requires proof beyond a reasonable doubt that the defendant was aware of a high probability of the fact in issue unless he believed that it did not exist. <u>Id.</u> The instruction proposed by the government contained none of those elements.

Second, the cases on which the government relied antedate a series of decisions by this Court discussing the constitutionality of criminal jury instructions on such key issues as allocation of the burden of proof, <u>Mullaney v. Wilbur</u>, 421 U.S. 684 (1975), <u>Patterson v. New York</u>, 432 U.S. 197 (1979) and the structure of permissive inferences, <u>Barnes v. United States</u>, 412 U.S. 837, (1973), <u>County Court v. Allen</u>, 442 U.S. 140 (1979). As a group, these decisions reaffirm the

principle that the burden is on the government to prove beyond a reasonable doubt each and every necessary element of a crime. Barnes and County Court specifically acknowledge that the inartful wording of permissive inference instructions can present subtle, but nonetheless serious, questions about the integrity of the reasonable doubt standard at that most crucial of junctures--when the jury formally deliberates guilt or innocence.

Petitioners contend that the instruction given at their trial is one which undermines the reasonable doubt standard. Rather than instructing the jury with regard to the reasonable doubt standard, the court instructed the jury that

> It is not necessary that the government or prosecution prove to a certainty that the defendant knew that fraudulent statements concerning loan applications were being submitted to various financial institutions.

This instruction falls far short of the

legal standard which appears to be accepted by virtually all of the federal circuit courts of this country. All of the instructions approved by other circuits contain language which requires the jury to find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid the truth.[3] Even though the trial court articulated the reasonable doubt standard at other junctures, the absence of that language from the immediate text of the instruction coupled with the statement that "it is not necessary that the government prove to a certainty . . ." could lead to confusion as to the government's burden of proof.

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[3] See this petition pages 15 to 23. Even the instructions approved by the Fifth Circuit, which appears to apply the least stringent criteria to conscious avoidance instructions, contained reasonable doubt language in the body of the instruction. United States v. Cook, 586 F.2d 572 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), 99 S.Ct. 2821 (1979); United States v. Deveau, 734 F.2d 1023 (5th Cir. 1984).

The trial judge's failure to include the reasonable doubt language in the body of the instruction prejudiced petitioners in two ways. First, the absence of the language could have caused the jury to assume that with respect to conscious avoidance, the government's burden is somehow different and perhaps less. Second, the inclusion of the reasonable doubt language would have directed the jury's attention to whether the basic facts supported an inference of guilty knowledge.

Further, such language would have made it clear that the underlying facts must be proven beyond a reasonable doubt before the ultimate inference of guilty knowledge could be drawn. If evidence of a basic fact is only weakly established, it should, as a matter of law, be insufficient to prove an ultimate fact such as guilty knowledge. This Court addressed this concern in _County Court_, _supra_, where it upheld a permissive

inference instruction allowing a jury to infer possession of a weapon from its presence in an automobile. Stressing the fact that the inference was permissive only, the Court noted that the jury was told to consider all of the evidence in the case before deciding whether or not possession could be inferred beyond a reasonable doubt. The instruction given in petitioners' trial runs counter to the County Court reasoning because it suggests that "deliberate disregard" or "conscious avoidance" by itself would be sufficient to sustain an inference of guilty knowledge. The failure to require proof beyond a reasonable doubt of the culpable act seriously prejudices a defendant by reducing the prosecutor's burden.

2. A conscious avoidance charge should instruct the jury that the government must prove beyond a reasonable doubt that a defendant was aware of a high probability of the truth in order to enable

the jury to adequately distinguish negligent oversight from criminally culpable conscious avoidance.

Petitioners suggest that the language of the instruction further undermined the reasonable doubt standard unless it was immediately and clearly qualified by an explanation to the jury concerning the exact nature of the circumstances which would support an inference of guilty knowledge.[4] The Second and Ninth Circuits require the jury to find beyond a reasonable doubt, both awareness of the high probability of the crucial fact and a conscious purpose to avoid the truth. (See this Petition p. 16-18). In United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977), the Ninth Circuit

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[4] Indeed, the Fifth Circuit is the only circuit which might countenance the conscious avoidance instruction given in this case. See e.g., United States v. Deveau, 734 F.2d 1023 (5th Cir. 1984)(use of "high probability" not crucial to the correctness of conscious avoidance instruction).

reviewed the propriety of an instruction containing both "beyond a reasonable doubt language" and "conscious purpose to avoid learning the truth" language. The court found the instruction sufficiently deficient to warrant reversal because it failed to instruct that a defendant's conscious purpose to avoid learning the truth is "culpable only if the jury also finds beyond a reasonable doubt that he was aware of the high probability that the vehicle carried contraband. A deliberate avoidance of knowledge is culpable only when coupled with a substantive awareness of high probability." Id. at 914.

The inclusion of "high probability" language does not deny the government the benefit of a fair inference from the facts as contrasted to the more difficult task of proving actual knowledge. This language protects the underlying premise that "to act knowingly, therefore, is not necessarily to

act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive knowledge' is not required." Jewell, supra at 700. But the inclusion of "high probability" language distinguishes guilty knowledge from negligent oversight, thereby maintaining the government's burden of proving criminal culpability.

Justice, then Judge, Anthony Kennedy articulated the purpose of the conscious disregard concept as a "definition of knowledge, not a substitute for it." Jewell, supra at 707, Judge Kennedy, dissenting. It is not enough that a defendant have displayed a reckless disregard for the truth or a mere suspicion of the circumstances. Justice Kennedy offered the following example of culpability under the conscious avoidance doctrine:

> To illustrate, a child given a gift-wrapped package by his mother

> while on vacation in Mexico may form a conscious purpose to take it home without learning what is inside; yet his state of mind is totally innocent unless he is aware of a high probability that the package contains a controlled substance. Thus, a conscious purpose instruction is only proper when coupled with a requirement that one is aware of a high probability of the truth. Id. at 707.

Applying Justice Kennedy's analysis, the jury should have been required to find beyond a reasonable doubt not only that the underlying guilty acts of misrepresentation by A & M employees took place, but to find beyond a reasonable doubt that the petitioners were subjectively aware of a high probability that this was the case. The "high probability" language is crucial because anything less does not sufficiently support an inference of guilty knowledge and drastically prejudices the defendants by reducing the government's burden of proof. Fundamental fairness demands the "high probability" language because to "permit an inference of knowledge from just a little

bit of suspicion is to relieve the prosecution of its burden of showing every element of the case beyond a reasonable doubt." Ramsey, supra at 190. The instruction given by the trial court in this case could have permitted the jury to convict petitioners without being certain beyond a reasonable doubt that they possessed the mens rea of guilty knowledge.

3. The doctrine of conscious avoidance is inapplicable to the act of conspiracy.

Finally, petitioners ask this Court to review the propriety of applying the conscious avoidance doctrine to the charge of conspiracy. Quite apart from the adequacy of the trial court's instruction, petitioners contend that the conscious avoidance instruction in connection with the conspiracy count in this case was error.

A review of the context of the trial judge's ultimate charge to the jury discloses that the conscious avoidance

instruction was intended to apply to the conspiracy count as well as the substantive counts. The government did not limit its proposed instruction to the substantive counts. (Government's Proposed Jury Instruction No. 1, App. A-8).

The trial judge never differentiated the application of the conscious avoidance charge.[5] Indeed, when his charge is viewed

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[5] The first stage of the court's instructions consisted of general statements applicable to the jury's deliberations on all counts of the indictment. The trial judge next summarized the indictment, outlining first the requirements of conspiracy and then the elements of wire fraud and false statement.

He then returned to general principles including conscious avoidance and aiding and abetting. In discussing aiding and abetting, the court made this comment: "This may appear to be a little bit akin to some of the law I gave you in connection within the conspiracy charge, but it does apply to these substantive charges." He then went on to discuss knowing association with a common plan or scheme. He advised the jury that "the evidence must show that the plan was knowingly formed and that a defendant or the person who is claimed to have been a member knowingly participated in the plan or scheme with the intent to advance or further some intended object or purpose of the plan or scheme." The trial

as a whole, it seems clear that he viewed the conscious avoidance instruction as being equally applicable to the conspiracy and the substantive counts. This was fundamental error.

The trial judge should have made it clear to the jury that this instruction was inapplicable to the determination of Anderson's and Bishop's criminal liability for conspiracy. The need for specificity and clarity in this regard was especially compelling below given the length and complexity of the trial judge's charge and the fact that the government wanted to argue liability on the substantive counts based on a Pinkerton theory.

Although there are few cases on point,

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judge then repeated the definition of "knowingly" and from there restated the intent requirements applicable to the case. At that juncture, the instruction referred again to the conspiracy count in connection with a Pinkerton charge which stressed both membership and the furtherance requirement.

the existing decisions agree that a conscious avoidance instruction is inappropriate in the context of proving membership in a criminal conspiracy. In United States v. Mankani, 738 F.2d 538 (2d Cir. 1984), the Court of Appeals for the Second Circuit held that membership in a conspiracy could not be proven by conscious avoidance. It added that conscious avoidance of participation in a conspiracy and actual agreement to be a member of a conspiracy are mutually exclusive concepts. Because the required mens rea for conspiracy is specific intent rather than mere knowledge, it is illogical to apply the conscious avoidance concept to intent to form a conspiracy. Id. at 547, nt. 1. If one consciously avoids participating in a conspiracy or consciously avoids learning of the existence or objects of a conspiracy one has displayed the opposite of the requisite intent. The trial judge's failure to

clearly specify the application of the conscious avoidance charge permitted the jury to convict on the conspiracy charge without first finding that the government had met the burden of proof with regard to each element of the <u>Pinkerton</u> theory.

This application is particularly prejudicial where a defendant receives consecutive sentences. This case presents an excellent setting 1) to determine whether the conscious avoidance instruction is applicable to conspiracy, and 2) if it is not applicable, to instruct the courts below as to how to ensure that the jury sufficiently limits its application to the substantive counts.

II. REVIEW IN THIS CASE IS APPROPRIATE BECAUSE A) THE FEDERAL COURTS OF APPEALS VARY SIGNIFICANTLY IN THEIR INTERPRETATION OF THE REQUIREMENTS OF RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, B) THE FOURTH CIRCUIT MISUSED THE PLAIN ERROR DOCTRINE BY APPLYING IT ABSENT A DETERMINATION ON THE MERITS OF THE ISSUE PRESENTED ON APPEAL AND C) THE FOURTH CIRCUIT MISAPPLIED THE

PLAIN ERROR STANDARD BECAUSE THE DEFENSE SUFFICIENTLY PRESERVED THE ISSUE FOR APPEAL.

Without reaching the merits of petitioners' appeal, the Fourth Circuit affirmed petitioners' convictions in an unpublished opinion, citing the failure of defense counsel to sufficiently object to the instruction at trial. Petitioners contend first that the Fourth Circuit erred when it applied the plain error doctrine absent a determination of whether the conscious avoidance instruction given at trial was error. Second, petitioners contend that application of the plain error standard was error because defense counsel satisfied the requirements of Rules 30 and 51 of the Federal Rules of Criminal Procedure. Finally, petitioners contend that the conscious avoidance instruction given at trial undermined the fundamental fairness of the trial and the integrity of the judicial process so as to warrant

reversal of conviction under either the harmless error or plain error standard.

A. The Fourth Circuit Erred When It Applied The Plain Error Doctrine In The Absence Of A Determination Of The Issue Presented On Appeal.

The plain error doctrine is used to correct "particularly egregious errors," those which "seriously affect the fairness, integrity, or public reputation of judicial proceedings." <u>Young</u>, p. 15 <u>quoting</u> <u>United States v. Frady</u>, 456 U.S. 152, 163 (1982) and <u>United States v. Atkinson</u>, 297 U.S. 157 (1936), respectively. In petitioners' case, the Fourth Circuit declined to address the adequacy of the conscious avoidance instruction. The Court determined first that there was no plain error and then concluded that " . . . it is not necessary for us to address a tangled question on the merits." (Appendix A-1 - A-4).

Although other circuits have used the plain error doctrine in the context of

determining whether a defective conscious avoidance instruction requires reversal of conviction, the Fourth Circuit appears to be alone in the use of the plain error doctrine as a means of avoiding the issue presented on appeal. Other circuits have examined the merits of the issue presented on appeal and then applied either the harmless error or the plain error standard required by Rule 52 as a test for determining whether reversal is required. For example, the Seventh Circuit rendered a carefully detailed analysis of a conscious avoidance instruction, then assessed the sufficiency of the objection at trial to determine whether the plain error standard of review was applicable. <u>United States v. Kehm</u>, <u>supra</u>. Similarly, each of the courts of appeal which have applied the plain error standard, first determined whether a trial error had occurred and then determined what standard of reversal to apply and finally

whether that standard had been met. United States v. Eaglin, supra, (willful concealment of an escaped federal prisoner); United States v. Lanza, supra, (conspiracy to commit wire fraud); United States v. Glick, supra, (mail fraud); United States v. Jewell, supra, (attempt to drive automobile containing controlled substance across international border); United States v. Squires, supra, (false statement). Also see United States v. Cincotta, supra, (fraud against the United States).

It is only logical that appellate courts first determine whether there has been an error. The plain error standard is used to correct "particularly egregious" errors which "seriously affect the fairness, integrity or public reputation of judicial proceedings," Young, supra at 15 where the complaining party has failed to preserve the error for appeal pursuant to Rules 30 and

51. Unless a court has conducted a thorough analysis of the issue presented on appeal, it cannot fully and properly consider whether the error demands application of the plain error exception to the contemporaneous objection rule. The plain error doctrine is a means to correct serious trial errors once they have been identified; it is not a means employed to avoid addressing difficult issues.

The Fourth Circuit's departure from the traditional analysis is an enormous disservice to the judicial system as well as these individual petitioners because it forecloses thoughtful development of expanding areas of the law and provides no guidance to the lower courts with regard to areas of dispute which are likely to recur. As discussed in the first section of this petition, the law is still developing with regard to the legal and constitutional requirements of conscious avoidance

instructions. The Fourth Circuit has not yet articulated guidelines for the language of the conscious avoidance instruction. Regardless of which standard the Fourth Circuit might ultimately endorse with regard to the conscious avoidance instruction, it is imperative that the Court provide guidelines that will enhance future development of the concept and that will assist the lower courts in conducting fair and efficient trials.

B. The Plain Error Standard Is Improperly Applied Where Defense Counsel Posed Timely Objection At Trial

Rule 30 of the Federal Rules of Criminal Procedure provides in relevant part that

> . . . no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Rule 51 dealing with objections to jury instructions contains essentially the same

provision.

The government argued in its brief before the Fourth Circuit that petitioner Anderson's counsel "objected to the instruction in general for no reason" (Appellee's brief, p. 15) and that after the charge was given, petitioners' counsel objected "for no reason." (Id. p. 16). The record at trial reflects that the government's characterization is simply inaccurate.

When the government presented the defective instruction at the charging conference, petitioner Anderson's counsel stated:

> All right, your Honor, we would certainly object to that request to charge, because it negates the element of intent, which is the essential element of the offense. Moreover, I know that citation, analogous at best, haven't had the opportunity to read the cases, cases from CFR (sic) implies to me that the principle of law is not taken from the case cited. (TR 2161) (emphasis added).

The government characterized the charge as

"standard law" and the trial judge interposed, "I looked over it, I understand you object to that charge or anything similar to it."

Later in the charging conference, counsel for Petitioner Bishop entered into the following dialogue with the trial judge:

> COUNSEL: Your Honor, the only thing I voice to the Court would be objection in regard to government's number one, conscious avoidance. Mr. Henry says it appears in language presented to negate that specific intent is necessary . . . My position is that the language as written in this proposed instructions (sic) negates the intent necessary to constitute a violation of these particular statutes, that if you use that language, it does away, or eliminates a specific intent that is necessary to show someone acted willfully and knowingly.
>
> THE COURT: Well I think what they are saying is that it is not an absolute requirement that direct evidence, knowledge or intent be introduced, that it may be by circumstantial evidence.
>
> COUNSEL: I have no problem with the intent coming by circumstantial evidence; I don't agree with the language they proposed to charge.

> THE COURT: Let's see how it comes out in the charge. If you're not satisfied, you're free to take exception to it. (TR 2174-75) (emphasis added).

After the trial judge read the instructions to the jury he heard formal exceptions. (TR 2393). At that time, counsel for petitioner Anderson stated:

> COUNSEL: We except to the charge on conscious avoidance which was tendered by the government, which we objected to.
>
> THE COURT: I left out that last sentence, because that was not - the rest of the charge was a direct quote from a Second Circuit case, but that last sentence was not. I left that last sentence out.
>
> COUNSEL: We except to that charge on the grounds that it negates the requirement to show specific intent.
>
> THE COURT: Very well. (TR 2397).

Counsel for petitioner Bishop excepted formally to the charge in the following colloquy:

> COUNSEL: Your Honor, no additional requests for instruction, but I would except to

> what was given as major portion of conscious avoidance requested instruction, government proposed jury instruction number one, even with omission of the last sentence, which Your Honor says -

At this point, the trial judge interrupted defense counsel's formal exception and stated:

> THE COURT: Let me just ask you this. Do you have, would it be simpler to let you join in all the exceptions that Mr. Henry made, or do you have any additional ones to make?

The trial judge then instructed:

> THE COURT: Let's let the record show you then on behalf of your client, Mr. Bishop, join in with all of the exceptions that he has taken to my charge. (TR 2398-99).

The plain error standard is typically applied where absolutely no objection to the conscious avoidance instruction is made at trial. Eaglin, supra; U.S. v. Dozier, 522 F.2d 224 (2d Cir 1975). In United States v. Young, supra, this Court determined that a prosecutor's improper remarks during closing arguments constituted error, bud did not

rise to the level of plain error "warranting the court to overlook the absence of any objection by the defense." Id. p. 14. (emphasis added). Despite the fact that the record below clearly shows that defense counsel both entered a timely objection, and stated the grounds for objection, the Fourth Circuit invoked the plain error standard of review in an opinion which failed to disclose the court's rationale in concluding that defense counsel's objection was deficient.

Rule 51 of the Federal Rules of Criminal Procedure applies the same requirement for preservation of appeal to jury instructions as does Rule 30 to trial objections. Rule 51 does not require the party objecting to a jury instruction to cure the defective language or propose an alternative instruction.[6] It simply

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[6] Indeed, for defense to do so might constitute a violation of counsel's duty of loyalty by putting him in the position of

requires that the complaining party state the matter to which he objects and the grounds of his objection prior to the jury's deliberations. This, petitioners' counsel plainly did.

The Fourth Circuit's failure to provide its rationale is a serious disservice not only to these petitioners but to all legal practitioners in the Fourth Circuit as well. Both attorneys objected to the instruction at the charging conference and again at the time for formal exceptions. Neither the trial judge nor the government asked for clarification of the objections. In fact, the trial judge cut off further discussion of the objections and created the impression that counsel's objection was understood and preserved for appeal. Under these circumstances, the Court of Appeals has a responsibility to provide guidance to

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actively assisting the government in reducing its own burden of proof.

the lower courts as to the requirements for preservation of appeals so that trial judges do not inadvertently foreclose opportunities for appeal.

Again, there appears to be confusion among the circuits as to the requirements of Rules 30 and 51. In U.S. v. Valle-Valdez, supra, the Ninth Circuit applied the harmless error standard to an inadequate conscious avoidance instruction where defense entered a timely and proper objection. In United States v. Glick, supra, the Tenth Circuit found that although the defense objected to the conscious avoidance instruction, the objection was inadequate. In spite of the fact that Rule 51 does not require the objecting party to propose a counter-instruction, the trial judge in Glick repeatedly requested that the defense do so. Id. p. 643. The Tenth Circuit found that the defendant's failure to comply with the judge's request

constituted a failure to sufficiently object so as to preserve the issue for appeal. The court then applied the plain error standard pursuant to Rule 52(b).

Wright & Miller provides a reasonable interpretation of the Rule 30 objection requirement:

> The objection must be specific enough so that the trial court can perceive the basis on which it is claimed that the instruction was erroneous. However the requirement of objections should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed, rather than being made into a trap for the unwary. Accordingly, where court and opposing counsel understand the defendant's position, even a vague objection should be held sufficient.

Wright & Miller, Federal Practice and Procedure, Criminal 2d, § 484 at 699-700.

The timeliness of petitioners' objections cannot be disputed. Further, petitioners' objection was highly specific, plainly stating that the instruction negated the intent requirement.

Both the trial judge and the government fully understood the nature of petitioners' objections to the proposed charge. The judge permitted fairly extensive discussion of the merits of petitioners' objections at the bail hearing. (App. A-9 - A-24) Neither the judge nor the government expressed confusion regarding the nature of petitioners' objections at those junctures where such discussion would have been logical: the charging conference, the formal exceptions, and the bail hearing.

Indeed, the government only raised a concern about the specificity of the objections <u>after</u> a conference call with Judge Ervin of the Fourth Circuit in which he expressed the opinion that the government's conscious avoidance instruction was seriously deficient and requested that U.S. Attorney Vinton Lide not use it in the future. Only then did the government complain of the specificity of the

objections. The plain error doctrine must not be used merely to salvage a seriously defective criminal conviction.

Guidance from this Court regarding the requirements of Rule 51 will enhance the ability of the appellate courts to apply the plain error standard more consistently, appropriately and fairly.

C. Even If Defense Counsel's Objection Was Not Sufficiently Precise To Preserve The Right Of Appeal, The Instruction Given At Trial Is So Defective As To Undermine The Fundamental Fairness Of The Trial, Thus Invoking The Plain Error Exception To The Contemporaneous Objection Rule.

While petitioners' contend that the plain error standard of review is inapplicable because they entered a timely and sufficient objection to the conscious avoidance instruction, petitioners believe that the government's conscious avoidance instruction is so seriously defective in the context of this case that it constitutes

reversible error even under the plain error standard. This Court determined that the plain error exception to the contemporaneous objection rule is warranted where a trial error seriously affects substantial rights and has an unfair prejudicial impact on the jury. Young, supra at 1047, n. 14. The Court requires a reviewing court to evaluate a case by reviewing the error in the context of the entire record because "each case necessarily turns on its own facts." Id. at 16, quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1740). Examination of the record will show that the conscious avoidance instruction given by the trial judge undermined the fundamental fairness of petitioners' trial.

In In Re Winship, 397 U.S. 358 (1970), this Court established that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." Id. at 364 (emphasis added). In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court found that the wording of a particular jury instruction could have allowed the jury to interpret the instruction as shifting the burden of proof from the government to the defendant on the element of intent. Such a shift in the burden of proof was unconstitutional under Winship. Id. at 524.

In petitioners' case, the ultimate issue was fraudulent intent. In the context of the trial, that inference was wholly dependent on knowledge of the underlying circumstances of the illegal activities of the salespersons working for petitioner Anderson. Upon a finding of guilty knowledge by the jury, the inference of fraudulent intent would be automatic. Thus, the government's proof of guilty knowledge was the key to conviction.

The government's conscious avoidance instruction, therefore, went to the heart of the trial and the heart of the burden of proof. In the context of this case, that instruction essentially defined the government's burden of proof. Without first establishing conscious avoidance, the jury could not find the permissive inference of guilty knowledge to support fraudulent intent.

Thus, it is crucial in a case such as this that the jury instruction on conscious avoidance be worded in such a way as to ensure that the government is held to its burden of proving every element of its case beyond a reasonable doubt. Here the absence of the reasonable doubt language coupled with the sentence "[i]t is not necessary that the government prove to a certainty . . .," could have caused the jury to understand that the charge lessened the government's

burden of proof on the element of guilty knowledge.

Further, the charge omits the important "high probability" language which would have required that the jury find the petitioners had subjective awareness of the deceptive practices utilized by the A & M sales staff. In the absence of "high probability" language, the final clause of the charge, "unless he actually believed that the statements in the applications were true," has the additional impact of shifting both the burden of production and the burden of persuasion on the issue of conscious disregard to the petitioners. The jury could have interpreted failure of the petitioners to satisfy this last clause as a means by which conscious avoidance could be proven and guilty knowledge presumed. This clause implies that petitioners had an affirmative burden to show they believed the information contained in the loan

applications was true. Under Winship and Sandstrom, such an interpretation by the jury would have unconstitutionally deprived petitioners of due process.

The conscious avoidance instruction given by the trial judge significantly diluted the government's burden of proof of the central issue and shifted the burden of persuasion to the petitioners. The instruction ultimately undermined the fundamental fairness of the trial depriving petitioners of the constitutional standard of due process of law. Consequently, petitioners' conviction warrants reversal under either the harmless error or the plain error standard.

CONCLUSION

This case is an appropriate vehicle for a) the resolution of the disparity among the federal courts of appeals with regard to the required minimum elements of an appropriate conscious avoidance jury instruction and its

relationship to conspiracy charges, and b) further guidance on the application of the plain error doctrine. Petitioners, therefore, respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted,

HENRY & PEARSON, P.C.
Attorneys for Petitioners

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5521(L)

United States of America,

Plaintiff-Appellee,

versus

William Sterling Anderson,

Defendant-Appellant.

No. 87-5522

United States of America,

Plaintiff-Appellee,

versus

Ronald Clement Bishop,

Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Chief Judge. (CR-86-176).

Argued: July 27, 1987
Decided: September 15, 1987

Before WINTER, Chief Judge,
and MURNAGHAN and SPROUSE, Circuit
Judges.

Albert Matthews Pearson, III, University of Georgia School of Law (Michael L. Rudasill on brief) for Appellants; Robert Claude Jendron, Assistant United States Attorney (Vinton D. Lide, United States Attorney on brief) for Appellee.

PER CURIAM:

William Sterling Anderson appeals convictions for conspiracy, 18 U.S.C. § 371, wire fraud, 18 U.S.C. § 1343, and the making of false statements, 18 U.S.C. § 1014. Ronald Clement Bishop appeals convictions for conspiracy and the making of false statements. The issue around which the appeals center is whether the instruction detailing the doctrine of conscious avoidance was accurate. The trial judge's instruction was as follows:

> Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the government or prosecution prove to a certainty that the defendant

> knew that fraudulent statements concerning loan applications were being submitted to various financial institutions. The element of knowledge may be satisfied by proof that the defendant acted with deliberate disregard of whether fraudulent loan applications were being prepared and submitted, and with conscious purpose to avoid learning the truth, unless he actually believed that the statements in the application were true.

Applicants contend that the instruction should have contained language to the effect that the jury would have to find that the defendants had a subjective awareness of a "high probability" of the existence of illegality in order to return guilty verdicts. We need not resolve whether in a properly presented case the arguments of appellants would carry the day, because appellants' objection to the language of the instruction was not adequately presented to the district judge. We are further of the firm opinion that there was no plain error which would require reversal even in the absence of a proper objection by the

defendants.

We are here presented with a classic case where the failure to object with sufficient precision denied the district judge the opportunity to correct the charge. Consequently it is not necessary for us to address a tangled question on the merits.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

CR-86 176

No. 87-5521

UNITES STATES OF AMERICA

Plaintiff-Appellee

v.

WILLIAM STERLING ANDERSON

Defendant-Appellant

APPEAL FROM the United States District Court for the District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be and the same is hereby, affirmed.

John M. Greacen, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 87-5521
87-5522

United States of America

Plaintiff-Appellee

versus

William Sterling Anderson, et al,

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that this petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Sprouse.

For the Court,

John M. Greace, Clerk

GOVERNMENT'S PROPOSED JURY INST. NO. 1

Conscious Avoidance

Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant. However, it is not necessary that the Government prove to a certainty that the defendant knew that fraudulent statements concerning loan applications were being submitted to various financial institutions. The element of knowledge may be satisfied by proof that the defendant acted with deliberate disregard of whether fraudulent loan applications were being prepared and submitted and with conscious purpose to avoid learning the truth, unless he actually believed that the statements in the applications were true. One may not deliberately close his eyes to what otherwise would have been obvious to him.

United States v. Jacobs, 475 F.2d 270, 287 at n. 37 (2d Cir.), *cert. denied*, *sub nom. Lavelle v. United States*, 414 U.S. 821 (1973); *United States v. Sarantos*, 455 F.2d 877, 880-82 (2d Cir. 1972); *United States v. Squires*, 440 F.2d 859, 864 (2d Cir. 1971).

EXCERPTS FROM TRANSCRIPT OF BAIL HEARING BEFORE TRIAL JUDGE

(p. 7, l. 10 - p. 13, l. 21)

MR. PEARSON: THE THREE POINTS THAT WE WISH TO RAISE FOR THE PURPOSES OF THIS HEARING RELATE TO THE CONSCIOUS AVOIDANCE INSTRUCTION. RESTRICTIONS ON CROSS EXAMINATION OF WITNESS UNDER PLEA AGREEMENT, AND WITH RESPECT TO MR. ANDERSON AT LEAST, THE EXCLUSION OF CERTAIN EVIDENCE TO BE USED IN REBUTTAL. THE CALENDARS, THAT WOULD HAVE ESTABLISHED HIS WHEREABOUTS DURING THE VARIOUS TRANSACTIONS IN QUESTION.

I NOTE THAT THE COURT IN ITS ORDER ADOPTED THE U.S. V. MILLER DECISION AS ITS GUIDE IN DECIDING THE ISSUES UNDER 1984 BAIL REFORM ACT WHICH SAY THAT A SUBSTANTIAL QUESTION IS EITHER A NOVEL QUESTION, A QUESTION THAT IS NOT DECIDED ON THE BASIS OF CONTROLLING PRECEDENT, OR A QUESTION THAT IS FAIRLY DEBATABLE.

WE THINK THAT MR. ANDERSON CAN SATISFY THE REQUIREMENTS OF THE LATTER TWO, FAIRLY

DEBATABLE QUESTIONS, AND QUESTIONS THAT ARE NOT RESOLVED ON THE BASIS OF CONTROLLING PRECEDENT.

FIRST, THE CONSCIOUS AVOIDANCE INSTRUCTION THAT THE PROSECUTION ASKED THIS COURT TO GIVE, WHICH THIS COURT ACCEPTED, IS AN INSTRUCTION THAT HAS NOT BEEN ADOPTED, ENDORSED, BY THE FOURTH CIRCUIT, NUMBER ONE.

NUMBER TWO, THE JURISDICTIONS THAT HAVE MOST WIDELY UTILIZED THE CONSCIOUS AVOIDANCE INSTRUCTION ARE THE SECOND CIRCUIT AND THE NINTH CIRCUIT, AND IN SOME MATERIAL RESPECTS THOSE CIRCUITS DISAGREE ABOUT THE APPROPRIATE FORMULATION.

SO WE FEEL WITH RESPECT TO THIS ISSUE WE HAVE AN ISSUE ON WHICH THE FEDERAL COURTS ARE IN A STATE OF FLUX. THIS CIRCUIT HAS NOT TAKEN A POSITION AND WE THINK THAT THAT IN AND OF ITSELF ENABLES US TO PASS OVER THE THRESHOLD AND SATISFY THE SUBSTANTIAL QUESTION REQUIREMENT.

NOW TO PARTICULARIZE OUR POSITION FURTHER, LET ME EXPLAIN THE RESPECTS IN

WHICH THE CONSCIOUS AVOIDANCE INSTRUCTION THAT WAS OFFERED FOR USE IN THIS CASE CAN BE CHALLENGED.

FIRST OFF, THE CONSCIOUS AVOIDANCE INSTRUCTION IS AN INSTRUCTION THAT STATES A PERMISSIVE INFERENCE. IT IS A SUBSTITUTE METHOD OF PROOF FOR KNOWLEDGE. IT DOES NOT RELIEVE THE GOVERNMENT OF ITS BURDEN OF PROOF TO ESTABLISH KNOWLEDGE BEYOND A REASONABle DOUBT, DOES NOT PUT A BURDEN OF PROOF--IS NOT SUPPOSED TO PUT A BURDEN OF PROOF ON THE DEFENDANT.

THE INSTRUCTION GIVEN IN THIS CASE IS DEFICIENT BECAUSE IT DID NOT ADEQUATELY EXPLAIN THE NATURE OF A PERMISSIVE INFERENCE NOR ITS RELATIONSHIP TO THE KNOWLEDGE REQUIREMENT WHICH THE GOVERNMENT MUST MEET BEYOND A REASONABLE DOUBT, YOU KNOW, WHAT RESPECTS.

WELL, FIRST, THE SECOND CIRCUIT, FROM WHICH THE GOVERNMENT DREW IT'S AUTHORITY IN DEVELOPING THIS CONSCIOUS AVOIDANCE INSTRUCTION, THE SECOND CIRCUIT HAS CHANGED

THE LAW IN THE YEARS SINCE 1973 AS TO WHAT THE APPROPRIATE INSTRUCTION THERE IS, IN THIS RESPECT:

THE SECOND CIRCUIT TAKES THE POSITION THAT IN ORDER FOR CONSCIOUS AVOIDANCE INSTRUCTION TO BE PROPER, THAT THE COURT MUST INSTRUCT THE JURY THAT IN ORDER TO FIND CONSCIOUS AVOIDANCE, THEY MUST FIND THAT THERE WAS A HIGH PROBABILITY THAT THE DEFENDANT WAS AWAKE, IN THIS CASE, THAT THE INFORMATION IN THE TRANSACTIONS OR LOAN STATEMENTS WERE FALSE, AND THAT HIGH PROBABILITY IS A THRESHOLD ISSUE OF FACT WHICH MUST BE ESTABLISHED BEYOND A REASONABLE DOUBT.

AND THEN THE JURY MUST ALSO FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS IN THIS CASE CONSCIOUSLY AVOIDED FACTS WHICH WOULD HAVE BEEN OBVIOUS TO THEM IF--HAD THEY INQUIRED.

BOTH ELEMENTS HAVE TO BE ESTABLISHED BEYOND A REASONABLE DOUBT BECAUSE THEY ARE IN THE NATURE OF THE PERMISSIVE INFERENCE

STRUCTURE. THEY ARE THE BASIC OR PRIMARY FACTS FROM WHICH THE INFERENCE IS DRAWN. THEY MUST BE PROVED BEYOND A REASONABLE DOUBT TO SUPPORT THE INFERENCE OF KNOWLEDGE WHICH IS DRAWN FROM THEM.

THIS INSTRUCTION DOES NOT MAKE IT CLEAR WHAT THE JURY'S DUTY IS WITH RESPECT TO THE REASONABLE DOUBT REQUIREMENT, AND IS DEFICIENT IN THAT RESPECT, IN ADDITION TO NOT MENTIONING THE "HIGH PROBABILITY OF AWARENESS," WHICH THE SECOND CIRCUIT NOW ESTABLISHES IT AS BEING ESSENTIAL TO A CORRECT STATEMENT UNDER ITS VERSION OF CONSCIOUS AVOIDANCE.

UNITED STATES VERSUS LANZA 790 FEDERAL 2D 1015.

"THE PRINCIPAL TO BE GLEANED FROM THESE CASES IS THAT A CONSCIOUS AVOIDANCE CHARGE MUST--MUST INCLUDE REFERENCES TO A PURPOSEFUL AVOIDANCE OF THE TRUTH, AND AWARENESS OF HIGH PROBABILITY, AND THE ABSENCE OF DEFENDANT'S ACTUAL BELIEF IN THE NON-EXISTENCE OF THE CRUCIAL FACT. ALL OF

THESE ELEMENTS WERE PRESENT IN THE CHARGE IN THIS CASE AND THEREFORE THERE IS NO ERROR."

THOSE ARE THE THREE NECESSARY ELEMENTS, ACCORDING TO THE SECOND CIRCUIT. THEY DID NOT EXIST, THEY WERE NOT A PART OF THE INSTRUCTIONS GIVEN IN ANY OF THE THREE CASES RELIED ON BY THE GOVERNMENT IN THIS CASE, THESE CASES ARE OUT OF DATE, THEY DO NOT REPRESENT THE LAW IN THE SECOND CIRCUIT. THEY ARE INCOMPATIBLE WITH THAT LAW, THEY ARE ALSO INCOMPATIBLE WITH THE LAW IN THE NINTH CIRCUIT AS WELL.

THE NINTH CIRCUIT, IN THE CASE UNITED STATES VERSUS VALLEY VALDEZ, DEALT WITH THE ISSUE OF CONSCIOUS AVOIDANCE INSTRUCTION, AND IN THAT CONTEXT THE COURT SAID:

"THE INSTRUCTION PERMITTED CONVICTION ON PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED WITH CONSCIOUS PURPOSE TO AVOID LEARNING THE TRUTH, AS FAR AS IT GOES THIS INSTRUCTION IS CORRECT. THE ERROR OR DEFICIENCY IN THE INSTRUCTION LIES IN ITS FAILURE TO ADD, FAILURE TO ADD, THAT THE

DEFENDANT'S CONSCIOUS PURPOSE TO AVOID LEARNING THE TRUTH IS CULPABLE ONLY IF THE JURY ALSO FINDS BEYOND A REASONABLE DOUBT THAT HE WAS AWARE OF THE HIGH PROBABILITY THAT THE VEHICLE HE WAS DRIVING CARRIED CONTRABAND."

THIS HIGH PROBABILITY ISSUE HAS GOT TO BE PROVEN BEYOND A REASONABLE DOUBT IN ADDITION TO THE OTHER PRIMARY FACT OF CONSCIOUS AVOIDANCE. NEITHER OF THOSE ELEMENTS IS INCORPORATED INTO THE CONSCIOUS AVOIDANCE INSTRUCTION OFFERED TO THIS COURT IN THIS CASE, AND WE THINK THAT THERE IS A SIGNIFICANT QUESTION AS TO WHETHER OR NOT THIS--THE FOURTH CIRCUIT, WOULD ADOPT THE INSTRUCTION GIVEN IN THIS CASE.

WE THINK IT MISTAKES THE LAW AS IT IS ESTABLISHED THROUGHOUT THE COUNTRY, AND WE THINK THAT IT ALSO HAS ONE OTHER DEFECT. THIS PARTICULAR INSTRUCTION IS BOTH MISLEADING AND BURDEN SHIFTING, BECAUSE IT CONTAINS IN ITS LAST SENTENCE WHAT IS CALLED THE EXCULPATORY CAVEAT. "UNLESS HE, THE

DEFENDANT, OR MR. BISHOP, ACTUALLY BELIEVED THAT THE STATEMENTS IN THE APPLICATIONS WERE TRUE."

THAT STATEMENT IS MISLEADING BECAUSE NEITHER DEFENDANT EVER MADE A CONTENTION THAT THEY BELIEVED THAT THE STATEMENTS IN THE APPLICATIONS WERE TRUE, THEY TOOK THE POSITION THAT THEY DID NOT KNOW THE APPLICATIONS WERE FALSE.

THEREFORE, THIS INSTRUCTION SUGGESTED TO THE JURY THAT AN ACQUITTAL WOULD BE APPROPRIATE IF THERE WAS SOME EVIDENCE OF CONSCIOUS AVOIDANCE--AND I SAY SOME EVIDENCE BECAUSE IT DOES NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT--SOME EVIDENCE OF CONSCIOUS AVOIDANCE, UNLESS THE DEFENDANTS ACTUALLY BELIEVED THE STATEMENTS WERE TRUE.

THAT IS NOT THE THEORY OF THE DEFENSE THAT EITHER DEFENDANT PROCEEDED ON, SO THIS INSTRUCTION MISSTATES THEIR POSITION IN A CRUCIAL RESPECT.

FINALLY THE INSTRUCTION IS BURDEN SHIFTING BECAUSE IT REQUIRES THE DEFENDANTS,

TO GET AN ACQUITTAL, TO PROVE ACTUAL BELIEVE THAT THE STATEMENTS IN THE APPLICATION WERE TRUE. THAT IS EVIDENCE WHICH IS GOING TO ONLY BE PRODUCED BY THE DEFENDANTS, THERE IS NO OTHER PARTY IN THIS CASE WHO WOULD PRODUCE THAT EVIDENCE, AND THE IMPORT OF THE INSTRUCTION IS CLEARLY BURDEN SHIFTING.

THIS INSTRUCTION, THE EXCULPATORY CAVEAT IS NOT GIVEN IN SOME JURISDICTIONS, PRIMARILY BECAUSE OF THE FACT THAT IT DOES HAVE THE POTENTIAL OF BEING BURDEN SHIFTING. IT IS CERTAINLY INAPPROPRIATE IN THE CONTEXT OF THIS CASE, GIVEN THE THEORY OF THE DEFENSE OFFERED BY THESE DEFENDANTS, AND IT SHOULD NOT HAVE BEEN APPENDED TO THIS.

THIS EXCULPATORY CAVEAT DATES BACK TO THE 1962 ALI FORMULATION OF KNOWLEDGE, WHICH IS A FORMULATION THAT PREDATES ALL OF THE BURDEN SHIFTING CASES, BEGINNING WITH MALANEY VERSUS WILBURN IN 1976. IT IS SIMPLY A FORMULATION THAT DOES NOT HAVE ANYTHING TO DO WITH CONTEMPORARY BURDEN SHIFTING RULES, AND SHOULD NOT HAVE BEEN

APPENDED TO THESE INSTRUCTIONS.

AND THEREFORE WE THINK WE DO HAVE A SUBSTANTIAL ISSUE, GIVEN THE STATE OF THE LAW IN OTHER CIRCUITS, OTHER THAN THE FOURTH CIRCUIT, WHICH HAS NO LAW ON THIS POINT. THERE IS A SUBSTANTIAL QUESTION AS TO WHAT THE FOURTH CIRCUIT WOULD DO, WHETHER IT WOULD ENDORSE THIS INSTRUCTION. WE THINK THERE IS A STRONG LIKELIHOOD THAT IT WOULD NOT, IF IT IS GUIDED BY THE SECOND AND NINTH CIRCUITS, BOTH CIRCUITS WHICH HAVE TAKEN THE LEAD IN THE DEVELOPMENT OF THE LAW IN CONSCIOUS AVOIDANCE.

THAT IS OUR FIRST GROUND TO ESTABLISH A SUBSTANTIAL QUESTIONS AND TO SATISFY THE REQUIREMENTS OF THE BAIL REFORM ACT.

(p. 24, l. 15 - p.26, l. 16)

YOUR HONOR, AND ALSO TO KEEP FROM GOING OVER SOME OF THE THINGS THAT MR. PEARSON HAS ADDRESSED, WITH REGARD TO THE CONSCIOUS AVOIDANCE, AT THE TIME THE PROPOSED INSTRUCTION WAS BEING CONSIDERED, WE OBJECTED TO THAT AS BEING A MINIMIZING OR

HAVING A MINIMIZING EFFECT OR DECREASING THE GOVERNMENT'S BURDEN REGARDING INTENT.

AND THE TWO CIRCUITS WHICH HAVE ADDRESSED THIS ISSUE ARE THE SECOND AND NINTH CIRCUIT, AS HAS BEEN PREVIOUSLY POINTED OUT TO THE COURT.

THERE IS A DISPARITY OR A DISAGREEMENT BETWEEN THOSE TWO CIRCUITS AS TO THE SPECIFIC LANGUAGE THAT IS TO BE USED IN GIVING THAT INSTRUCTION, THE BIG DISTINCTION BEING THE INCLUSION OF THE LANGUAGE OF "A HIGH PROBABILITY."

THE COURT: WELL, I THINK MR. PEARSON HAS COVERED THAT ADEQUATELY.

MR. RUDASILL: IN ADDITION TO THAT, IN THE SECOND CIRCUIT, I WOULD DRAW THE COURT'S ATTENTION TO THE CASE OF UNITED STATES VERSUS MANKANI, 738 FED.2D, 538, 1984 DECISION, WHERE THE SECOND CIRCUIT SPECIFICALLY HELD THAT THIS INSTRUCTION WAS NOT APPROPRIATE IN CONSPIRACY, OR A CHARGE OF CONSPIRACY.

"THE APPLICATION OF THIS PARTICULAR

INSTRUCTION IS APPROPRIATE WHERE THE ESSENTIAL ELEMENT OF THE CRIME IS GUILTY KNOWLEDGE; IF IT'S MORE THAN THAT, THAT IS INTENT, NOT MERE KNOWLEDGE, THEN THE INSTRUCTION IS INAPPROPRIATE."

THE TESTIMONY, FACTUALLY, REGARDING MR. BISHIP, DURING THE COURSE OF THE TRIAL, THE CROSS EXAMINATION ELICITED FROM THE GOVERNMENT'S WITNESSES PROBLEMS WITH ACCOUNTABILITY FOR MONIES PAID REGARDING THE VARIOUS TRANSACTIONS THAT WERE THE BASIS OF THE INDICTMENT.

THE TESTIMONY ESTABLISHED THAT THERE WAS NO ACCOUNTABILITY, THAT THE--IN FACT, SOME OF THE SALESMEN POCKETED MONEY THAT WAS NOT TURNED IN TO--FOR LACK OF A BETTER TERM--THE MAIN OFFICE.

THESE QUESTIONS WERE ELICITED WITH SHOWING JUST THAT FACT, THAT THERE WAS NO METHOD OF ACCOUNTABILITY, THAT THERE WAS NO WAY ANYONE COULD HAVE SPECIFIC KNOWLEDGE WITH REGARD TO WHETHER OR NOT IN ACTUALITY A TOTAL SUM OF MONEY HAD BEEN PAID ON THE

PURCHASE OF A MOBILE HOME.

THE INSTRUCTION AS GIVEN MINIMIZED THAT EFFORT ON THE PART OF THE DEFENSE IN THE SHOWING THAT THERE WAS NO ACTUAL KNOWLEDGE ON THE PART OF MR. BISHOP. IT IS AS MR. PEARSON INDICATED, A METHOD OF SHIFTING THE BURDEN.

YOUR HONOR DEFINED, AS A PART OF YOUR CHARGE, "KNOWINGLY," AND DEFINED IT AS BEING "VOLUNTARY, INTENTIONALLY, NOT MISTAKE OR ACCIDENT." FACTUALLY, THERE WAS NO BASIS TO CHARGE THE CONSCIOUS AVOIDANCE, ESPECIALLY REGARDING MR. BISHOP, WHEN HE DID NOT TESTIFY.

THERE WAS NO TESTIMONY THAT THERE WAS ANY DELIBERATE ATTEMPT OR INTENT ON HIS PART TO DISREGARD THE TRUTH OF THE PARTICULAR STATEMENTS THAT WERE INVOLVED, OR IN THIS PARTICULAR CASE, DEPOSIT SLIPS.

(p. 32, 1. 12 - p. 33, 1. 4)

THE COURT: NOW, THE LATEST THING WE HAVE FROM THE SECOND CIRCUIT IS A 1986 DECISION, AT PAGE 1021 OF 790 FED. 2D,

UNITED STATES VERSUS LANZA, THE COURT SAID:

"THE CONSCIOUS AVOIDANCE OF KNOWLEDGE LANGUAGE IS TO BE FOUND IN THE MODEL PENAL CODE'S DEFINITION OF QUOTE, "KNOWLEDGE," END QUOTE."

AND THEN IT QUOTES: "WHEN KNOWLEDGE OF THE EXISTENCE OF A PARTICULAR FACT IS AN ELEMENT OF AN OFFENSE, SUCH KNOWLEDGE IS ESTABLISHED IF A PERSON IS AWARE OF A HIGH PROBABILITY OF ITS EXISTENCE UNLESS HE ACTUALLY BELIEVES THAT IT DOES NOT EXIST." END QUOTE.

I DON'T SEE WHERE THAT IS VERY MUCH DIFFERENT FROM WHAT WE GAVE HERE. I MEAN, IT SAYS, "IT MAY BE SATISFIED BY PROOF THAT THE DEFENDANT ACTED WITH DELIBERATE DISREGARD OF WHETHER FRAUDULENT LOAN APPLICATIONS WERE BEING PREPARED AND SUBMITTED AND WITH CONSCIOUS PURPOSE TO AVOID LEARNING THE TRUTH, UNLESS HE ACTUALLY BELIEVED THAT THE STATEMENTS IN THE APPLICATION WERE TRUE."

(p. 46, l. 5 - p. 47, l. 2)

MR. PEARSON: WELL, IT'S REMARKABLY THAT THEIR OWN INSTRUCTION, THEY DON'T GET THE RIGHT SECOND CIRCUIT LANGUAGE, AND THEN THEY SAY IT DOESN'T MATTER. THE SECOND CIRCUIT SAYS, "THE USE OF THE HIGH PROBABILITY" LANGUAGE IN THE INSTRUCTION"--

THE COURT: WELL, YOU CAN SAY THINGS IN A DIFFERENT WAY. YOU DON'T HAVE TO USE THOSE TWO WORDS "HIGH PROBABILITY."

MR. PEARSON: WELL, THE SECOND CIRCUIT'S POSITION IS THAT YOU DO. AND THE NINTH CIRCUIT'S POSITION IS THAT YOU DO. THE ALI TOOK THE POSITION THAT THE "HIGH PROBABILITY" LANGUAGE WAS IMPORTANT.

THE COURT: WELL, YOU HAVE BEEN OVER THAT, I UNDERSTAND.

MR. PEARSON: TO MAINTAIN THE DISTINCTION BETWEEN A NO KNOWLEDGE REQUIREMENT AND RECKLESSNESS. THAT'S WHY THE LANGUAGE WAS PUT IN THERE.

WE THINK THAT'S PIVOTAL TO WHAT THE GOVERNMENT'S BURDEN IS IN THIS CASE. THE SECOND CIRCUIT SAYS, "YOU HAVE GOT TO HAVE

THE "REASONABLE DOUBT" LANGUAGE, COUPLED WITH, "HIGH PROBABILITY." THAT'S THE LAW. WE FEEL LIKE WE HAVE GOT AN ARGUMENT IN FRONT OF THE FOURTH CIRCUIT--

THE COURT: I UNDERSTAND YOUR POSITION PERFECTLY.

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

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No. 87-1499

In the Supreme Court of the United States

OCTOBER TERM, 1987

W. STERLING ANDERSON AND RONALD CLEMENT BISHOP,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners' general objection to any conscious avoidance instruction did not constitute an adequate objection to the specific wording of the instruction that was actually given.

2. Whether the language used in the conscious avoidance instruction constituted plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A5) was entered on September 15, 1987. A petition for rehearing was denied on January 6, 1988 (Pet. App. A6-A7). The petition for a writ of certiorari was filed on March 7, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to commit wire fraud and to submit

false statements to federally insured financial institutions, in violation of 18 U.S.C. 371. Petitioner Anderson was also convicted on ten counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of submitting a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014.[1] Petitioner Bishop was convicted on six counts of submitting false statements to a federally insured financial institution. Anderson was sentenced to concurrent terms of five years' imprisonment on the conspiracy count and on four of the wire fraud counts, to be followed by concurrent terms of two years' imprisonment on the remaining counts. Bishop was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at trial is not in dispute (see Pet. 3-8). Briefly, it showed that Anderson was the owner and president of A & M Mobile Homes in Spartanburg, South Carolina. Bishop, Anderson's brother-in-law, worked in A & M's office. In early 1982 a mobile home manufacturer offered A & M kickbacks on a group of 100 or more trailers. The manufacturer provided A & M with invoices for the trailers that exceeded the dealer's actual price by $1,000 to $2,000 on each mobile home. A & M submitted the inflated invoices to financial institutions that provided "floor financing" for the mobile homes.[2] In that way, the company financed the homes for more than it paid the manufacturer for them. C.A. App. 49-62, 90-91, 373-374, 1006, 1184. Based on the inflated invoices, A & M received

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[1] Petitioner Anderson was acquitted on five false statement and four wire fraud counts.

[2] "Floor financing" allows the dealer to pay for and keep vehicles in stock pending sale without tying up the dealer's finances. The dealer pays interest on the money and repays the loan when the mobile home is sold.

an excess of approximately $136,000 in floor financing over the amount that it paid for the mobile homes (*id.* at 57, 318, 1183-1184).

Many of the mobile homes were old models or were in poor shape and thus difficult to sell. Identifying plates on some of the homes were fraudulently altered to indicate that they were newer models. C.A. App. 49-51, 56, 158-162, 502, 1005-1006, 1203-1204. Anderson knew of those alterations (*id.* at 159-160, 303, 501-502, 1203-1204). To handle the increased inventory, Anderson hired several additional salesmen and encouraged them to do whatever was necessary to sell the mobile homes, including giving false information to lending institutions so that prospective purchasers could obtain financing (*id.* at 70, 105-106, 305-307, 479-483, 810-811, 1012, 1193). For customers who could not otherwise obtain a loan, A & M salesmen created fictitious credit references and employment, withheld information about bad credit history, inflated the buyers' incomes, and inflated the down payments that they made. A & M also created fictitious bank deposit slips to document the inflated down payments. *Id.* at 110-111, 116-117, 121-123, 135, 145-147, 151-153, 156, 483, 589-641, 819-832, 842, 1011-1018, 1023, 1092, 1137-1139, 1185-1186, 1295-1296, 1336-1337.

Two lending officials from different financial institutions testified that they informed Anderson that A & M salesmen were falsifying credit documents. Anderson told the officials that he did not allow that and would put a stop to it. C.A. App. 404-412, 446-447. Contrary to his protestations, however, the evidence established that Anderson was aware of and encouraged the fraudulent loan applications (*id.* at 117-118, 122, 135, 137, 142-143, 145, 165-166, 308, 488-490, 570-571, 599, 605, 613-619, 633-634, 640, 737, 769-771, 803-804, 814-815, 817-818,

843, 853, 858, 860, 995, 998, 1012, 1014-1015, 1093, 1133-1134, 1187, 1193, 1212, 1300, 1321). Bishop actively assisted in the preparation of fraudulent documents (*id.* at 148-149, 151-153, 298, 300-301, 495, 503, 507, 595-597, 830, 832, 845, 856, 1018, 1095, 1142, 1328, 1599-1620).

2. At trial, petitioners did not dispute that fraudulent loan applications were filed with the lending institutions. They contended, however, that they did not know that the information contained in the applications was false. Anderson testified that he did not know of or participate in the fraudulent activities (*e.g.*, C.A. App. 1734-1738, 1753, 1756, 1764, 1825-1831). He claimed that his involvement in political activities and in an unrelated criminal investigation and prosecution distracted him from his expanding business responsibilities at A & M (*id.* at 1715-1717, 1739-1741, 1750-1754). Bishop, who did not testify at trial, suggested through his cross-examination of Anderson that he was not in a position to verify the information that he passed along in the course of his clerical and bookkeeping duties (*id.* at 1833-1852).

In light of petitioners' defense that they did not have actual knowledge that false information was being filed with the lending institutions, as well as evidence that Anderson told some salesmen that he did not want to know about their illegal activities (C.A. App. 490, 1321-1322), the government requested a jury instruction on conscious avoidance of the truth. Anderson objected to the court's giving any conscious avoidance instruction, however phrased, on the ground that such an instruction would "negate[] the element of intent" (*id.* at 2161, 2162). Bishop objected, without further amplification, that "the language as written in this proposed instruction negates the intent necessary to constitute a violation of these particular statutes" (*id.* at 2174). The court responded: "Let's

see how it comes out in the charge. If you're not satisfied, you're free to take exception to it" (*id.* at 2175). The court then instructed the jury (*id.* at 2374; see also Pet. App. A2-A3) as follows:

> Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the government or prosecution prove to a certainty that the defendant knew that fraudulent statements concerning loan applications were being submitted to various financial institutions. The element of knowledge may be satisfied by proof that the defendant acted with deliberate disregard of whether fraudulent loan applications were being prepared and submitted and with conscious purpose to avoid learning the truth, unless he actually believed that the statements in the applications were true.

Following the jury charge, petitioners again objected to the fact that the court gave a conscious avoidance instruction, but they did not take issue with any specific language used in the instruction or suggest a more acceptable formulation (C.A. App. 2397-2399).

3. On appeal, petitioners dropped their objection to the fact that the trial court gave a conscious avoidance charge (see Appellants' C.A. Br. 17). Instead they contended that the instruction the court gave was fatally flawed in two respects. First, they claimed that the instruction did not require the jury to find a "high probability" that petitioners were actually aware of the existence of a scheme to submit false financial statements to the lending institutions. Second, they argued that the instruction diluted the reasonable doubt standard and shifted the burden of proof to petitioners. The court of appeals found that petitioners' specific objections to the wording of the

instruction were not made to the district court and that petitioners accordingly waived those challenges. The court explained that it was "here presented with a classic case where the failure to object with sufficient precision denied the district court the opportunity to correct the charge" (Pet. App. A4). After examining the charge given by the trial court, the court of appeals concluded that "there was no plain error which would require reversal even in the absence of a proper objection by the defendants" (*id.* at A3-A4).

ARGUMENT

1. Petitioners contend (Pet. 39-41, 45-55) that the court of appeals erred when it applied the plain error standard to review their challenge to the conscious avoidance charge. They claim that their general objection to the conscious avoidance charge was sufficient to apprise the trial court of their reservations concerning the wording of the instruction that was actually given. All the courts of appeals agree, however, that a general objection to the fact that an instruction is to be given does not preserve a challenge to the particular wording of the charge. See, *e.g.*, *United States* v. *Glenn*, 828 F.2d 855, 862 (1st Cir. 1987); *United States* v. *Lanza*, 790 F.2d 1015, 1021 (2d Cir.), cert. denied, 479 U.S. 861 (1986); *United States* v. *Cardinal*, 782 F.2d 34, 36 (6th Cir.), cert. denied, 476 U.S. 1161 (1986); *United States* v. *Markowski*, 772 F.2d 358, 363 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986); *United States* v. *Marbury*, 732 F.2d 390, 403-404 (5th Cir. 1984); *United States* v. *Glick*, 710 F.2d 639, 643 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). There is therefore no conflict among the circuits on the question whether petitioners' objections were sufficient to preserve their challenge to the content of the conscious avoidance

charge. In any event, the factbound question of whether petitioners' general objections were sufficient to preserve their present complaints does not warrant review by this Court.

Rule 30, Fed. R. Crim. P., states that "[n]o party may assign as error any portion of the charge * * * unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Petitioners' objections during the trial can only be viewed as objections to the court's giving any conscious avoidance charge at all (see C.A. App. 2161-2162, 2174, 2397, 2398-2399). On appeal, however, petitioners did not dispute that a conscious avoidance charge was proper in the circumstances of this case. See Appellants' C.A. Br. 17 (emphasis in original) ("The issue presented in this appeal is not the use per se of the conscious avoidance instruction, but rather the appropriate *form* of that instruction."). Yet while petitioners sought to challenge the "form" of the instruction on appeal, they made no objection on that ground at trial. Nor did they offer any curative language of their own such as they now propose.

As the court of appeals recognized (Pet. App. A4), petitioners' "failure to object with sufficient precision denied the district judge the opportunity to correct the charge." Under these circumstances, petitioners' present objections to the charge were not preserved at trial and the court of appeals therefore properly reviewed the challenged instruction only for plain error. See Fed. R. Crim. P. 52(b).[3]

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[3] Petitioners complain (Pet. 44) that the court of appeals did "an enormous disservice to the judicial system as well as these individual petitioners" by failing to pass first upon the propriety of the instruction given by the trial court before applying the plain error doctrine in affirming petitioners' convictions. Despite petitioners' unsupported

2. Petitioners contend that the conscious avoidance charge given by the trial court was "so seriously defective" (Pet. 55) that it "undermined the fundamental fairness of petitioners' trial" (Pet. 56). As they did in the court of appeals, petitioners argue that the content of the instruction was defective in two respects. First, the instruction did not contain language requiring the jury to find that "the defendant was aware of a high probability of the fact in issue unless he believed that it did not exist" (Pet. 26). Second, the instruction did not "require[] the jury to find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid the truth" and thus "could lead to confusion as to the government's burden of proof" (Pet. 28). In addition, petitioners contend (Pet. 35-39) that the conscious avoidance instruction was erroneously applied to the conspiracy count as well as to the substantive counts. None of these complaints, however, rises to the level of plain error.

a. Petitioners contend (Pet. 15-23) that the courts of appeals are in disarray on the appropriate wording of a conscious avoidance instruction. In particular, petitioners note that the Second and Ninth Circuits have held that such an instruction should include language requiring that the defendant be aware of the "high probability" that the fact at issue is true. See *United States* v. *Aulet,* 618 F.2d 182, 191 (2d Cir. 1980); *United States* v. *Valle-Valdez,* 554 F.2d 911, 914 (9th Cir. 1977); *United States* v. *Jewell,* 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Other circuits have not required such language, see, *e.g.*, *United States* v. *Deveau,* 734 F.2d

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claim (Pet. 43) that it is "only logical" to proceed in this order, however, there is no requirement that the court of appeals do so. Because it is clear that the charge given did not amount to plain error, a discussion of the merits of the charge would have been dictum that would not necessarily have bound the court of appeals in future cases.

1023 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), although some have recommended it, see *United States* v. *Manriquez Arbizo,* 833 F.2d 244, 250 (10th Cir. 1987). While there is some disagreement among the circuits as to the precise verbal formula to be used in a proper conscious avoidance charge, that issue is not presented in this case since petitioners never objected to the charge on that ground.

There is no circuit conflict on the question actually presented, which is whether the absence of the language petitioners now propose constitutes plain error. Even in those circuits that have required "conscious avoidance" instructions to contain language regarding the defendant's awareness of the "high probability" that the fact in dispute was true, the courts have held that the failure to use that language does not constitute plain error. See, *e.g.*, *United States* v. *Eaglin,* 571 F.2d 1069, 1074-1075 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Jewell,* 532 F.2d at 704 n.21; *United States* v. *Dozier,* 522 F.2d 224, 228 (2d Cir.), cert. denied, 423 U.S. 1021 (1975). See also *United States* v. *Glick,* 710 F.2d 639, 643-644 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Cincotta,* 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982). Nor do petitioners suggest any reason why the absence of such language—which was in any event implicit in the requirement that the jury find that "the defendant acted with *deliberate* disregard of whether fraudulent loan applications were being prepared and submitted" (Pet. App. A3 (emphasis added))—"undermined the fairness of the trial and contributed to a miscarriage of justice." *United States* v. *Young,* 470 U.S. 1, 17 n.14 (1985).[4]

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[4] Although the charge in this case did not contain the "high probability" language on which petitioners focus their present complaint, it was carefully balanced in other respects. It emphasized at the outset

b. Contrary to petitioners' contention, the conscious avoidance instruction given by the trial court did not shift the burden of proof to petitioners or dilute the requirement of proof beyond a reasonable doubt. See *United States* v. *MacKenzie,* 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Ciampaglia,* 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980). The district court extensively and repeatedly instructed the jury on the government's obligation to prove each element of each offense beyond a reasonable doubt (C.A. App. 2337-2338, 2343, 2347, 2359, 2360, 2361, 2363, 2364, 2367, 2368, 2370, 2371, 2373, 2376-2377, 2379, 2383, 2386, 2403). The court also repeatedly made clear that the burden of proof rested entirely with the government (*id.* at 2338, 2361, 2365-2368, 2370, 2373, 2379, 2386, 2402-2404).

Viewing the court's instructions as a whole, see *Cupp* v. *Naughten,* 414 U.S. 141, 147 (1973), there is no possibility that the jury could have failed to understand that the prosecution bore the burden of proving petitioners' guilt as to each element of every offense beyond a reasonable doubt. Indeed, immediately before giving the conscious avoidance charge, the district court reminded the jury that "there are four essential elements which the prosecution

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that negligence or foolishness was not sufficient to establish knowledge; it required that the proof of conscious avoidance show "deliberate disregard" and "conscious purpose to avoid learning the truth;" and it added that even in such cases, petitioners could not be convicted if the jury found that they actually believed that the statements in the loan applications were true. In these respects, the charge given in this case was significantly more balanced and favorable to petitioners than the charge that the Second Circuit criticized in *United States* v. *Morales*, 577 F.2d 769, 774-775 & n.4 (1978).

must prove beyond a reasonable doubt in order to establish the offense prohibited by Section 1014" (C.A. App. 2373). After setting forth the elements, including the requirement that the false statement be made knowingly and intentionally (*id.* at 2373-2374), and after explaining that materiality is a question of law not to be considered by the jury (*id.* at 2374), the court gave its instruction on conscious avoidance (*ibid.*). In light of the context, it is unrealistic for petitioners to speculate (Pet. 29) that "[t]he trial judge's failure to include the reasonable doubt language" within his three-sentence charge on conscious avoidance "could have caused the jury to assume that with respect to conscious avoidance, the government's burden is somehow different and perhaps less."

c. Petitioners mistakenly contend (Pet. 35-39) that the district court gave the conscious avoidance instruction in connection with the conspiracy count as well as the substantive counts. In fact, the district court carefully separated its instructions on the conspiracy count and the substantive counts. After concluding the conspiracy charge the court stated: "[T]hat finishes my charge as to the conspiracy count. * * * Does anyone feel you would like to take a break at this time? I'm going to have to charge you about the essential elements of the substantive counts of the indictment" (C.A. App. 2368). The court then continued, "I'm leaving my charge on the conspiracy count and will now talk about what we call substantive counts" (*id.* at 2369).

The conscious avoidance instruction was then given in connection with the substantive counts, immediately after the court outlined the elements of 18 U.S.C. 1014 (C.A. App. 2373), and immediately before an aiding and abetting instruction related to the substantive counts (*id.* at

2374). Shortly thereafter, in the context of a *Pinkerton* charge (see *Pinkerton* v. *United States,* 328 U.S. 640 (1946)), the court again made clear that it was discussing only the substantive counts and that its instructions on conspiracy had been concluded (C.A. App. 2376-2377, 2382).

Even if the court had made the conscious avoidance instruction applicable to the conspiracy count, however, that would not be error, since the degree of knowledge required for the fact at issue is the same for conspiracy as for the underlying substantive offense. See, *e.g., United States* v. *Ditommaso,* 817 F.2d 201, 218-219 (2d Cir. 1987); *United States* v. *Kehm,* 799 F.2d 354, 362 (7th Cir. 1986); *United States* v. *Reed,* 790 F.2d 208, 211 (2d Cir.), cert. denied, 479 U.S. 954 (1986); *United States* v. *Lanza,* 790 F.2d at 1022-1023; *United States* v. *Knight,* 705 F.2d 432, 434 (11th Cir. 1983). In any event, it would certainly not be plain error, which is the applicable standard of review in light of petitioners' failure to object to the instruction on that ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE 1988 — 202/037/60509

Supreme Court, U.S.
FILED
JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

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PETITIONERS REPLY TO THE BRIEF FOR THE UNITED STATES OF AMERICA

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Petitioners recognize that it is crucial that issues presented to this Court are relevant to the overall administration of justice and not just to the individuals seeking review. Contrary to the government's characterization of the issues presented on appeal, (United States of America's Brief in Opposition, p. 6), the questions presented here are not fact-bound to petitioners' situation. The constitutional sufficiency of this frequently used jury instruction, the definition of requisite elements of criminal offenses, the precision required for preservation of trial objection for appeal, and the application of the proper standard of review are questions facing defendants, prosecutors, and trial judges on a daily basis.

Petitioners also recognize the value in

refraining from ruling prematurely on issues affecting the administration and fairness of criminal trials. Such restraint allows the circuits to explore and develop the law and consider the balance and interplay of competing issues. Most of the circuits have considered and ruled on the issues presented by petitioners. And, it is clear that there is disparity in the rulings. That disparity has resulted in serious discrepancies and confusion in the administration and prosecution of the law in various parts of the country. While such differences often foster thoughtful development of the law, they have served their purpose within the context of the issues presented here. There is no longer any need to develop the issue of the constitutional requirements and applications of a conscious avoidance instruction or the issue of sufficiency of objection. As the cases cited by

Petitioners and the government illustrate, the arguments and problems have been clearly identified and addressed by the circuits - with different outcomes. The time is right for intervention, for guidance and for clarification. Not only do the cases cited by Petitioners and government illustrate the disparate interpretations and applications of the conscience avoidance instruction, but this very case is an example of the confusion which the conscious avoidance instruction poses for defendants, prosecutors and trial judges. The government's instruction was drawn from three Second Circuit cases, the most recent of which was decided in 1973 (See Petition Appendix 8) and which the government cited with a "cf." notation indicating that the authority stands for a proposition which, although lending support, is different from the main proposition. <u>A Uniform System of Citation</u>, 9 (13th ed. 1981). At trial,

petitioner Anderson's and petitioner Bishop's counsel questioned the legal authority supporting the instruction and objected that the government's instruction undermined the element of intent. (TR 2161 and 2174-75). The government prosecutor claimed that the proposed charge was "standard law" (TR 2161) which it plainly was not - the language of the charge had been found constitutionally deficient and specific requirements had been mandated by the circuit in which it was initially offered. (See this Petition for Writ of Certiorari, p. 16-17 and 25-26). Next, the trial judge commented at the charging conference that he typically used Devitt and Blackmar instructions verbatim, (A 2172), yet he did not do so in this trial. Finally, Judge Ervin of the Fourth Circuit advised the government to discontinue use of the obsolete form. (See Appellants' Petition for Rehearing and Suggestion for

Rehearing en Banc, p. 6). There is no doubt that the sufficiency of this particular charge is neither settled nor "standard."

This case further highlights the problems which the differences in the requirements of the individual circuits create. These differences are critical because the concept of conscious avoidance is a definition of intent, and is not itself an additional, lesser mens rea as are reckless disregard and negligence. Thus, even subtle differences in language can both blur the distinctions between the levels of criminal culpability and lessen the degree of culpability the prosecution must prove. While the instruction may appear to be merely a function of statutory interpretation, it presents constitutional ramifications because of the potential for lessening the government's burden by effectively reducing the statutory mens rea requirement.

It is particularly crucial that the government be held to its full burden of proof where, as petitioners' situation illustrates, the government's case against a defendant rests solely on the prosecutor's ability to prove guilty knowledge. Guilty knowledge is the crux of this conviction. Thus, it is imperative that a jury charge which goes to the central issue of the case be pristine in its statement of the government's burden. This particular charge, which supported the theory on which the government based its closing statements, failed to sufficiently delineate the government's burden. First, the burden of proof beyond a reasonable doubt is omitted. Second, it is not merely omitted, but is supplanted by the statement ". . . it is not necessary that the government prove to a certainty . . . ." The charge does not instruct as to what degree the government must prove guilty knowledge. This leaves

the jury at best in doubt as to the degree they must be certain and at worst free to determine their own standard. Finally, the sentence, ". . . unless he actually believed that the statements in the application were true," shifts the burden to the defendant. Instead of the government showing the defendant possessed the requisite guilty knowledge, the defendant bears the burden of proving his belief.

The government cites cases which stand for the proposition that a conscious avoidance instruction is applicable to conspiracy charges. These cases are counter to the Second Circuit's position that such a charge is incongruent with the requisite elements of conspiracy. (See Petition for Writ, p. 37-39). Thus, the government's research only underscores petitioners' contention that the disagreement among the circuits with regard to the application and the required elements of a conscious

avoidance charge merit intervention from this Court. Certainly, the government offers the conscious avoidance instruction in cases of conspiracy because it believes such a charge will facilitate conviction by reducing the burden of proving actual knowledge. Further, the reduction of the government's burden in a criminal prosecution on any charge clearly impacts substantial rights. Where such a reduction infringes substantial rights or undermines the fairness of a criminal trial, the plain error doctrine is invoked.

Finally, prosecutors, defendants and trial judges alike will benefit from clarification of the degree of specificity that is required to preserve an objection for appeal pursuant to Rule 30. Judges need to know at what point to allow, to encourage, or to foreclose counsel's discussion of objections. In petitioners' trial, the judge indicated that he

understood the defendant's objection and cut-off further discussion. (TR 2174-75, 2393, 2397-99). If Rule 30 ultimately requires a higher degree of perfection, defendants will be assisted in pursuing their objections to prevent foreclosure of the appellate process. Guidance on this issue will benefit prosecutors as well because, if the requirement of Rule 30 is less stringent than the government argues here, then prosecutors will understand that they must themselves request greater clarification in order to narrow the issues for appeal. Regardless of whether Rule 30 requires greater or lesser precision in stating objections than was attained by petitioners' counsel, guidance from this Court will enhance the administration and fairness of criminal trials in this country.

This case presents opportunity for the Court to review and clarify several issues on which the courts of appeals differ,

issues on which nearly every circuit has ruled, and on which lower courts must rule on a daily basis. While petitioners Anderson and Bishop would rejoice if review were to result in a ruling in their favor, it is clear that regardless of the ultimate outcome, clarification of the questions they present is timely, will be beneficial to the administration of trials and is essential to development of the law.

Respectfully submitted,

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